

print directory services as well as electronic publishing services.<sup>269</sup> BellSouth contends that, by omitting the word "separated" in subsection (c)(1)(B), Congress clarified that some activities of a BOC affiliate that is engaged in the provision of electronic publishing services may be unrelated to electronic publishing.<sup>270</sup> According to BellSouth, a BOC therefore may engage in joint marketing activities with its directory affiliate so long as such activities "relate to the traditional directory products of the directory affiliate rather than any electronic directory products."<sup>271</sup> SBC argues that section 274(c)(1)(B) does not apply if a BOC performs services for an affiliate that are unrelated to the provision of electronic publishing.<sup>272</sup>

119. U S WEST, in contrast, argues that the phrase "that is related to the provision of electronic publishing" modifies "affiliate" because such an interpretation provides BOCs with greater flexibility in organizing their businesses and is consistent with congressional intent.<sup>273</sup> For example, U S WEST contends that, if we adopt this interpretation, a BOC choosing to provide electronic publishing services through a section 272 affiliate would be subject to the joint marketing provisions of section 274(c)(1)(B), rather than section 272.<sup>274</sup>

### 3) Discussion

120. We conclude that the phrase "that is related to the provision of electronic publishing" modifies the "promotion, marketing, sales, or advertising" activities that are circumscribed by section 274(c)(1)(B). As such, we interpret section 274(c)(1)(B) of the Act to prohibit a BOC from carrying out any promotion, marketing, sales or advertising activities with an affiliate, if such activities "relate to" the provision of electronic publishing.<sup>275</sup> As an initial matter, we find that the joint marketing prohibition in section 274(c)(1)(B) is intended to address situations that are not otherwise covered by section 274(c)(1)(A). Consequently,

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<sup>269</sup> BellSouth at 17.

<sup>270</sup> *Id.*

<sup>271</sup> *Id.*

<sup>272</sup> SBC at 11.

<sup>273</sup> U S WEST at 7.

<sup>274</sup> We note that, while U S WEST argues that the phrase "that is related to the provision of electronic publishing" modifies the word "affiliate" in section 274(c)(2)(B), it also contends that this interpretation would permit the section 274 joint marketing restrictions to be applied only to the electronic publishing activities of a section 272 affiliate. In that respect, therefore, U S WEST's argument is similar to those of commenters supporting a contrary semantic interpretation of the phrase.

<sup>275</sup> The term "affiliate" is defined in section 274(i)(1) as "any entity that, directly or indirectly, owns or controls, is owned or controlled by, or is under common ownership or control with, a Bell operating company. Such term shall not include a separated affiliate." 47 U.S.C. § 274(i)(1).

we conclude that section 274(c)(1)(B) contemplates situations in which a BOC affiliate is involved in the provision of services that are in some manner "related to" the provision of electronic publishing, but does not provide electronic publishing services disseminated by means of a BOC's or any of its affiliates' basic telephone service. Because a BOC or BOC affiliate may engage in the provision of electronic publishing that is disseminated by means of such BOC's or any of its affiliates' basic telephone service only through a separated affiliate or an electronic publishing joint venture,<sup>276</sup> a BOC "affiliate" that falls under section 274(c)(2)(B) of the Act, by definition, must not engage in such provision of electronic publishing. A BOC affiliate that provides electronic publishing services by means of its basic telephone service would constitute a "separated affiliate" subject to the joint marketing restriction in section 274(c)(1)(A).

121. Consequently, section 274(c)(2)(B) addresses situations in which a BOC may have, for example, an affiliated holding company that, in turn, holds an ownership interest in a separated affiliate. Such a BOC would be precluded from carrying out any promotion, marketing, sales or advertising activities for or in conjunction with that affiliated holding company if and to the extent that such activities are "related to the provision of electronic publishing." A BOC, however, would not be prohibited from engaging in marketing activities with the affiliated holding company that are unrelated to the provision of electronic publishing. This interpretation of section 274(c)(1)(B) effectively would prevent the BOCs from indirectly promoting, marketing, selling, or advertising the electronic publishing services of a separated affiliate.

122. We reject U S WEST's contention that section 274(c)(1)(B) prohibits a BOC from carrying out marketing activities for or with an *affiliate* that is related to the provision of electronic publishing. Given the definition of "separated affiliate," which contemplates the provision of electronic publishing services by such entity, it is difficult to conceive of an affiliate "related to the provision of electronic publishing" that would not otherwise constitute a separated affiliate, and thus be subject to the joint marketing restriction in section 274(c)(1)(A). We also reject BellSouth's contention that section 274(c)(1)(B) of the Act is intended to address situations in which a BOC provides electronic publishing and non-electronic publishing services through one affiliate. As noted above, a BOC affiliate that provides electronic publishing services through the BOCs' or any of its affiliates' basic telephone service would constitute a "separated affiliate" that would be subject to the joint marketing prohibition in section 274(c)(1)(A).

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<sup>276</sup> See 47 U.S.C. § 274(a).

b. Scope of Section 274(c)(1)(A)

1) Background

123. We sought comment in the *Notice* on whether a BOC can carry out both section 272 and section 274 activities through one entity or affiliate, and, if so, whether the affiliate would have to comply with the requirements of section 272, section 274, or both.<sup>277</sup> We conclude in this *Order* that a BOC may provide both section 272 and section 274 services through the same affiliate. In so doing, however, a BOC must comply with the structural and transactional requirements of both sections 272(b) and 274(b).<sup>278</sup> We also conclude that a BOC providing section 272 and section 274 services through the same affiliate must comply with the applicable joint marketing provisions and nondiscrimination provisions of both those sections.<sup>279</sup>

124. Some parties raised the issue of whether and to what extent the joint marketing restrictions of section 274 apply in cases where a BOC provides through the same affiliate electronic publishing services and non-electronic publishing services, *i.e.*, print directory services, that do not fall under section 272 of the Act.<sup>280</sup> Because BOCs currently may be providing electronic publishing and such non-electronic publishing services through one affiliate, or may wish to provide such services through one entity in the future, we address that issue in this *Order*.

2) Comments

125. U S WEST and BellSouth argue that, if a BOC provides electronic publishing services and non-electronic publishing services, such as print directory services, through the same affiliate, the joint marketing restrictions of section 274 would apply *only* to the electronic publishing activities of the affiliate.<sup>281</sup> U S WEST argues, *inter alia*, that Congress, in adopting the prohibitions in section 274(c)(1) of the Act, intended to circumscribe, for a limited time, joint marketing activities between a BOC and its section 274 separated affiliate because such affiliate would use the BOC's basic telephone service to disseminate its electronic publishing services.<sup>282</sup> U S WEST argues that the section 274 joint marketing

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<sup>277</sup> *Notice* at ¶ 48.

<sup>278</sup> *See supra* at ¶¶ 110-115.

<sup>279</sup> *Id.*

<sup>280</sup> *See* U S WEST at 8-11; BellSouth *ex parte* letter, October 15, 1996.

<sup>281</sup> *Id.*

<sup>282</sup> U S WEST at 9-10.

prohibitions thus were intended to restrict the BOCs' ability to "leverage those basic services to favor its electronic publishing services which use [such] services."<sup>283</sup> U S WEST maintains therefore that, absent a connection between a publishing activity and the BOC's network operations, there is no indication that Congress meant to impede commercial speech activities engaged in by a BOC corporate enterprise.<sup>284</sup>

### 3) Discussion

126. We conclude that, while a BOC may provide through the same affiliate both electronic publishing services and non-electronic publishing services, such as print directory services, which do not fall under section 272 of the Act, it must comply with the joint marketing requirements of section 274. The plain language of section 274(c)(1)(A) states that "a [BOC] shall not carry out any promotion, marketing, sales, or advertising for or in conjunction with a separated affiliate."<sup>285</sup> Section 274(c)(1)(A), therefore, precludes a BOC from engaging in certain activities with a separated affiliate as a corporate entity, even in connection with non-electronic publishing services.

127. While our interpretation could provide a disincentive for BOCs to offer electronic publishing and non-electronic publishing services through the same affiliate, as U S WEST points out,<sup>286</sup> the unambiguous statutory language requires this interpretation. We thus conclude that section 274(c)(1)(A) prohibits marketing and sales-related activities carried out by a BOC for or in conjunction with a separated affiliate, irrespective of whether such affiliate provides both electronic publishing services and non-electronic publishing services, such as print directory services, that do not fall under section 272 of the Act.

#### c. Activities Prohibited under Section 274(c)(1)

##### 1) Background

128. In the *Notice*, we observed that the activities proscribed by section 274(c)(1) include the "promotion, marketing, sales, or advertising" by a BOC for or with an affiliate.<sup>287</sup> We tentatively concluded that such activities "encompass prohibitions on advertising the availability of local exchange or other BOC services together with the BOC's electronic publishing services, making those services available from a single source and providing

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<sup>283</sup> *Id.* at 10.

<sup>284</sup> *Id.*

<sup>285</sup> 47 U.S.C. § 274(c)(1)(A) (emphasis added).

<sup>286</sup> U S WEST at 10.

<sup>287</sup> *Notice* at ¶ 53.

bundling discounts for the purchase of both electronic publishing and local exchange services."<sup>288</sup> We sought comment on that tentative conclusion and on whether any other types of prohibitions were contemplated.<sup>289</sup>

## 2) Comments

129. Ameritech, AT&T and NAA generally agree with our tentative conclusion regarding the types of activities that are prohibited under sections 274(c)(1)(A) and (B) of the Act.<sup>290</sup> Ameritech also argues, however, that the only prohibited marketing activities are those that "involve the BOC and the electronic publishing affiliate working together,"<sup>291</sup> and therefore nothing precludes unilateral marketing, promotion, or sales activities by either the BOC or its separated affiliate.<sup>292</sup> In addition, Ameritech contends that bundling discounts may be offered in all cases of permissible joint marketing activities.<sup>293</sup> According to Ameritech, "while the BOC requires regulatory authority to discount regulated services, the electronic publisher is free to set its unregulated price -- and any promotional discounts -- as it sees fit."<sup>294</sup> AT&T disputes Ameritech's contention that section 274(c)(1) of the Act permits a BOC to market the electronic publishing services of its separated affiliate so long as it does not "coordinate" its promotional activities with such affiliate.<sup>295</sup>

130. U S WEST generally agrees that the activities prohibited under sections 274(c)(1)(A) and (B) of the Act include making local exchange or other BOC services available together with electronic publishing services, but states that this prohibition is subject to the inbound telemarketing exception in section 274(c)(2)(A) of the Act.<sup>296</sup> PacTel argues that a separated affiliate, electronic publishing joint venture, teaming or other business entity is not precluded from purchasing the telecommunications services of a BOC and then

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<sup>288</sup> *Id.*

<sup>289</sup> *Id.*

<sup>290</sup> Ameritech at 16; AT&T at 20; NAA at 6.

<sup>291</sup> Ameritech at 16.

<sup>292</sup> *Id.* Ameritech argues, for example, that section 271(c)(1) does not prohibit a BOC from unilaterally purchasing an electronic ad for its services in the electronic publishing affiliate's Internet service, because such action does not involve a "coordinated effort" with the electronic publishing affiliate to jointly promote both the BOC's and the electronic publisher's services. *Id.*

<sup>293</sup> Ameritech Reply at 17..

<sup>294</sup> *Id.*

<sup>295</sup> AT&T Reply at 17.

<sup>296</sup> U S WEST at 15.

advertising such services with electronic publishing services, making the services available from a single entity, and providing bundled discounts.<sup>297</sup>

131. A number of parties contend that sections 274(c)(1)(A) and (B) of the Act prohibit only the BOCs from carrying out certain joint marketing activities, and that the provisions should not be interpreted to restrict the joint marketing activities that may be carried out by either a "separated affiliate" under section 274(c)(1)(A), or an "affiliate" under section 274(c)(1)(B).<sup>298</sup> SBC specifically argues that the statute should not be interpreted to impose any restrictions on a separated affiliate's ability "to market and sell services or products of the BOC, or those of any other affiliate or an unrelated party."<sup>299</sup> Bell Atlantic similarly contends that an affiliate is not prohibited under the statute "from marketing the BOC's services and products or acting as a single point of contact for the customer."<sup>300</sup>

132. NYNEX and YPPA argue that permitting a separated affiliate to market jointly its electronic publishing services with BOC telecommunications services would allow customers to realize the benefits of one-stop shopping.<sup>301</sup> In addition, NYNEX and PacTel maintain that imposing marketing restrictions on a BOC separated affiliate that do not also apply to such affiliate's competitors would place the separated affiliate at a competitive disadvantage.<sup>302</sup> A number of parties also contend that nothing in the Act prohibits a BOC affiliate from carrying out joint marketing activities as an agent for either or both the BOC and the separated affiliate.<sup>303</sup>

133. Conversely, AT&T and Time Warner argue that the marketing prohibitions in section 274(c)(1) should not be construed to apply only to the marketing activities of the BOC.<sup>304</sup> According to AT&T, allowing a separated affiliate to market jointly its electronic publishing services with BOC telecommunications services would allow the BOC to "move its entire marketing department into the separated affiliate" in violation of the statutory prohibition against a BOC carrying out any marketing 'in conjunction with' a separated

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<sup>297</sup> PacTel Reply at 11.

<sup>298</sup> Bell Atlantic at 9; NYNEX Reply at 9; SBC Reply at 14; USTA at 5; YPPA Reply at 7.

<sup>299</sup> SBC Reply at 14.

<sup>300</sup> Bell Atlantic at 9.

<sup>301</sup> NYNEX Reply at 10; YPPA at 6-7.

<sup>302</sup> NYNEX at 19; PacTel Reply at 11.

<sup>303</sup> NYNEX Reply at 9-10 n.23; SBC Reply at 15; USTA at 5.

<sup>304</sup> AT&T Reply at 17; Time Warner Reply at 4.

affiliate."<sup>305</sup> Time Warner similarly states that interpreting section 274(c)(1) to apply only to the BOCs would allow the BOCs to circumvent the joint marketing restrictions of section 274.<sup>306</sup>

### 3) Discussion

134. As an initial matter, we conclude that the prohibitions in section 274(c)(1) apply only to activities carried out by a BOC. Sections 274(c)(1)(A) and (B) of the Act only proscribe BOC activities.<sup>307</sup> We also find that neither a separated affiliate under section 274(c)(1)(A), nor an affiliate under section 274(c)(1)(B), is prohibited from marketing its services together with BOC telecommunications services, so long as such marketing activity is performed unilaterally by the separated affiliate or affiliate, respectively. Thus, a separated affiliate or affiliate is permitted under sections 274(c)(1)(A) and (B) to market its electronic publishing services with basic telephone service purchased from the BOC. We conclude that this type of marketing, in which a separated affiliate or affiliate unilaterally markets BOC local exchange service as an input to its electronic publishing services, is not prohibited under sections 274(c)(1)(A) or (B). We specify that marketing by the separated affiliate or affiliate must be unilateral not because section 274(c)(1) directly imposes any marketing restrictions on such entities, but, as a practical matter, because section 274(c)(1) bars a BOC from carrying out "marketing . . . for or in conjunction with" such separated affiliates or affiliates.<sup>308</sup>

135. We reject AT&T's and Time Warner's contention that permitting a separated affiliate to market BOC telecommunications services would allow a BOC to circumvent the restrictions of section 274. As noted above, section 274(c)(1), by its terms, applies only to activities carried out by a BOC. While AT&T's and Time Warner's arguments pertain only to a "separated affiliate," we have no basis for concluding that Congress intended to apply the restrictions in sections 274(c)(1)(A) and (B) to either separated affiliates or affiliates, respectively. Moreover, based on the plain language of sections 274(c)(1)(A) and (B), which prohibits a BOC from carrying out any "promotion, marketing, sales, or advertising for or *in conjunction with*" a separated affiliate or affiliate, a BOC would be precluded from, for example, "moving its entire marketing department into the separated affiliate" in order to circumvent the section 274(c)(1) restrictions.<sup>309</sup>

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<sup>305</sup> AT&T Reply at 17.

<sup>306</sup> Time Warner Reply at 4-5.

<sup>307</sup> See 47 U.S.C. §§ 274(c)(1)(A), (B).

<sup>308</sup> *Id.*

<sup>309</sup> See AT&T Reply at 17.

136. Based on the above analysis, we also find that a BOC affiliate may carry out "promotion, marketing, sales, or advertising" activities as an agent for either a "separated affiliate" under section 274(c)(1)(A), or another "affiliate" under section 274(c)(1)(B). Because neither a separated affiliate nor an affiliate is subject to the restrictions in sections 274(c)(1)(A) and (B) of the Act, a BOC affiliate that acts as an agent for such separated affiliate or affiliate also is not subject to those restrictions. As in the case of a separated affiliate or affiliate, however, the scope of the agent's activities may be limited, as a practical matter, by the legal bar on a BOC carrying out promotion, marketing, sales or advertising activities "for or in conjunction with" such affiliates. We conclude, however, that because section 274(c)(1)(A) applies to activities carried out by BOCs, a BOC affiliate is prohibited from acting as an agent for the BOC in performing marketing and sales-related activities under that section, contrary to arguments raised by some parties. We also note that, under the definition of "Bell operating company" in section 274(i)(10), a BOC includes "any entity or corporation that is owned or controlled by" such BOC.<sup>310</sup> As such, the section 274(c)(1) joint marketing prohibitions applicable to BOCs also would apply to entities that are owned or controlled by a BOC, such as an entity that acts as an agent for a BOC.

137. We also conclude, based on their language, that sections 274(c)(1)(A) and (B) of the Act prohibit a BOC or BOC agent from advertising local exchange or other BOC services together with electronic publishing services, making those services available from a single point of contact and providing bundling discounts for the purchase of both electronic publishing and local exchange services, except as permitted under section 274(c)(2) of the Act.<sup>311</sup> Since section 274 only proscribes BOC activities, however, we conclude, consistent with our discussion above, that these activities may be carried out by a separated affiliate or affiliate, subject only to the practical limitation that a BOC may not participate owing to the legal bar on its ability to carry out promotion, marketing, sales or advertising activities "for or in conjunction with" a separated affiliate or an affiliate.

138. In our *Non-Accounting Safeguards Order* implementing sections 271 and 272 of the Act, we recognized that "bundling" contemplates the offering of BOC resold local exchange services and interLATA services as a package under an integrated pricing schedule.<sup>312</sup> As a result, we concluded that the concept of "bundling" includes "providing a discount if a customer purchases both interLATA services and BOC resold local services, conditioning the purchase of one type of service on the purchase of the other, and offering both interLATA services and BOC resold local services as a single combined product."<sup>313</sup>

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<sup>310</sup> 47 U.S.C. § 274(i)(10).

<sup>311</sup> See *infra* Part III.C.2.a. and III.C.2.c.

<sup>312</sup> *Non-Accounting Safeguards Order* at ¶ 277.

<sup>313</sup> *Id.*



139. Based on the definition of "bundling" in our *Non-Accounting Safeguards Order*, we conclude that "bundling" refers to the offering by a BOC or BOC agent of BOC local exchange and electronic publishing services as a package under an integrated pricing schedule. This restriction flows not only from section 274(c)(1), but from the fact that a BOC is forbidden by section 274(a) to engage in the provision of electronic publishing disseminated by means of its basic telephone service except through a separated affiliate or an electronic publishing joint venture. By providing such bundled services, the BOC or its agent would be engaged in the provision of electronic publishing in contravention of section 274(a). We further find, consistent with the *Non-Accounting Safeguards Order*, that sections 274(c)(1)(A) and (B) of the Act prohibit a BOC or BOC agent from providing customer discounts for the purchase of local exchange and electronic publishing services, conditioning the purchase of one type of service on the other, or offering both electronic publishing and local exchange services as one product. Moreover, we conclude, based on the explicit language of section 274(c)(1), that sections 274(c)(1)(A) and (B) of the Act prohibit a BOC or BOC agent not only from offering for sale both local exchange and electronic publishing services, but also from advertising those services in a single advertisement, and from selling both services through a single point of contact, e.g., a single sales agent, except as permitted under section 274(c)(2).<sup>314</sup> We find that Congress intended to proscribe those activities in adopting sections 274(c)(1)(A) and (B) of the Act.

**d. Interplay Between Section 274 Joint Marketing Provisions and Other Provisions of the Act**

**1) Background**

140. In the *Notice*, we sought comment on whether and to what extent the joint marketing provisions in section 272(g) and the customer proprietary network information (CPNI) provisions in section 222 of the Act affect implementation of section 274.<sup>315</sup>

**2) Comments**

141. NYNEX argues that, because the marketing provisions in sections 272 and 274 of the Act apply to different services, the restrictions in section 274 should not be applied to the services and facilities provided under section 272.<sup>316</sup> PacTel maintains that sections 272(g) and 222 of the Act do not affect implementation of section 274.<sup>317</sup> U S WEST maintains that, based on implied consent gleaned from either the business relationship or

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<sup>314</sup> See *infra* Part III.C.2.a. and III.C.2.c.

<sup>315</sup> *Notice* at ¶ 53.

<sup>316</sup> NYNEX at 19.

<sup>317</sup> PacTel at 14.

customer notification, CPNI may be used by the BOC in marketing a separated affiliate's electronic publishing offerings.<sup>318</sup> U S WEST also contends that, under section 222(d)(3) of the Act, a BOC could use CPNI on an inbound telemarketing call for both telecommunications and electronic publishing services of the BOC and third parties, provided the customer consented to such use on the call.<sup>319</sup>

### 3) Discussion

142. As discussed above, we conclude that, while a BOC may provide through the same affiliate both section 272 and section 274 services, it must comply with the applicable joint marketing restrictions of both those sections. We decline to address arguments raised in this proceeding regarding the interplay between section 274 and section 222 of the Act, relating to privacy of customer information. The Commission has pending a proceeding to implement section 222 of the Act.<sup>320</sup> Until the completion of that proceeding, we defer any decision on the extent, if any, that section 222 of the Act affects implementation of section 274. As noted in the *CPNI NPRM*, the CPNI requirements the Commission previously established in the *Computer II* and *Computer III* proceedings<sup>321</sup> remain in effect pending the outcome of the CPNI proceeding, to the extent that they do not conflict with section 222 of the Act.<sup>322</sup>

## 2. Permissible Joint Activities -- Section 274(c)(2)

### a. Joint Telemarketing -- Section 274(c)(2)(A)

#### 1) Background

143. As we observed in the *Notice*, section 274(c)(2) of the Act permits three types of joint activities between a BOC and a separated affiliate, electronic publishing joint venture, affiliate, or unaffiliated electronic publisher under specified conditions.<sup>323</sup> Under section 274(c)(2)(A) of the Act, a BOC may provide "inbound telemarketing or referral services

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<sup>318</sup> U S WEST at 17. U S WEST notes, however, that CPNI could not necessarily be used with respect to comparable electronic publishing offerings of others without customer consent. *Id.*

<sup>319</sup> U S WEST at 17-18.

<sup>320</sup> See *Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information*, CC Docket 96-115, *Notice of Proposed Rulemaking*, 11 FCC Rcd 12513 ("CPNI NPRM").

<sup>321</sup> See discussion of *Computer II* and *Computer III* *infra* at ¶ 189.

<sup>322</sup> CPNI NPRM at ¶ 3.

<sup>323</sup> *Notice* at ¶ 54.

related to the provision of electronic publishing for a separated affiliate, electronic publishing joint venture, affiliate or unaffiliated electronic publisher: [p]rovided, [t]hat if such services are provided to a separated affiliate, electronic publishing joint venture, or affiliate, such services shall be made available to all electronic publishers on request, on nondiscriminatory terms."<sup>324</sup>

144. We stated in the *Notice* that the statute is silent as to the specific obligations section 274(c)(2)(A) imposes on a BOC.<sup>325</sup> We noted that the term "inbound telemarketing" is defined in section 274(i)(7) as "the marketing of property, goods, or services by telephone to a customer or potential customer who initiated the call."<sup>326</sup> The term "referral services," however, is not defined in the statute. As we discussed in the *Notice*, the Joint Explanatory Statement states that the Conference Committee adopted the provisions of the House bill relating to electronic publishing, with some modifications relating to sunset of the section 274 requirements and use of BOC trademarks by separated affiliates and electronic publishing joint ventures.<sup>327</sup> The provision of the House bill relating to electronic publishing joint ventures was identical to the provision ultimately adopted by the Conference Committee.

145. The Committee Report accompanying H.R. 1555 states that:

Subsection (c)(2)(A) permits a BOC to provide inbound telemarketing or referral services related to the provision of electronic publishing, if the BOC provides the same service on the same terms and conditions, and prices to non-affiliates as to its affiliates. The term 'inbound telemarketing or referral services' is defined . . . to mean 'the marketing of property, goods, or services by telephone to a customer or potential customer who initiated the call.' Thus, a BOC may refer a customer who seeks information on an electronic publishing service to its affiliate, but must make sure that the referral service is available to unaffiliated providers. No outbound telemarketing or similar activity, under which the call is initiated by the BOC or its affiliate or someone on its behalf, is permitted.<sup>328</sup>

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<sup>324</sup> 47 U.S.C. § 274(c)(2)(A).

<sup>325</sup> *Notice* at ¶ 55.

<sup>326</sup> 47 U.S.C. § 274(i)(7).

<sup>327</sup> Joint Explanatory Statement at 156.

<sup>328</sup> See H.R. Rep. 104-204, 104th Cong., 1st Sess. 86 (1995) ("House Report" or "Report").

In the *Notice*, we sought comment on whether the conditions imposed on inbound telemarketing discussed in the House Report should be adopted, and whether we should adopt any regulations pertaining to outbound telemarketing.<sup>329</sup>

## 2) Comments

146. AT&T argues that we should adopt the conditions on inbound telemarketing discussed in the House Report, *i.e.*, that a BOC may offer inbound telemarketing services to its affiliate only if it makes those services available to unaffiliated providers of electronic publishing services on the same terms, conditions and prices.<sup>330</sup> In addition, it contends that a BOC should be prohibited from engaging in outbound telemarketing, consistent with the House Report.<sup>331</sup> AT&T argues that section 274(c)(2)(A) should not be construed as an "open-ended authorization for the BOCs to market the electronic publishing services of their separated affiliates" because such an interpretation would result in the exception swallowing the rule.<sup>332</sup> While NAA agrees that we should adopt the conditions on inbound telemarketing discussed in the House Report, it also argues that a BOC may provide outbound telemarketing services to an electronic publishing joint venture under section 274(c)(2)(C).<sup>333</sup>

147. Conversely, the BOCs generally contend that they are permitted to engage in a broader range of marketing activities under section 274(c)(2)(A). In particular, Ameritech argues that section 274(c)(2)(A) expressly authorizes a BOC to handle all aspects of the electronic publisher's sales process while on an inbound telephone call.<sup>334</sup> NYNEX similarly maintains that section 274(c)(2)(A) does not restrict in any way the inbound telemarketing services that a BOC may provide to a separated affiliate, electronic publishing joint venture or affiliate, except to require the BOC to make such services available to all electronic publishers "on request, on nondiscriminatory terms."<sup>335</sup> In addition, SBC argues that section

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<sup>329</sup> *Notice* at ¶ 55.

<sup>330</sup> AT&T at 20; *see also* YPPA at 7.

<sup>331</sup> AT&T at 20.

<sup>332</sup> AT&T Reply at 18.

<sup>333</sup> NAA at 7.

<sup>334</sup> Ameritech at 20; *see also* U S WEST Reply at 10. According to Ameritech, this includes: (1) promoting the publisher's services and quoting prices; (2) consummating a sale; (3) obtaining sales-related information; (4) obtaining credit information; (5) forwarding all such information to the publisher; and (6) promoting the BOC's services to work in conjunction with the electronic publisher's services. *Id.*

<sup>335</sup> NYNEX at 20-21. NYNEX therefore argues that section 274(c)(2)(A) should be interpreted to permit a BOC to engage in any of the following inbound telemarketing activities on a nondiscriminatory basis: (1) handle, as an agent for the separated affiliate providing the electronic publishing services, incoming telephone calls from customers or potential customers requesting products or services; (2) use a toll-free number provided

274(c)(2)(A) allows a BOC not only to refer a customer who requests information regarding an electronic publishing service to its affiliate, but also permits a BOC to market electronic publishing services to customers who inquire about them.<sup>336</sup> SBC also argues that section 274(c)(2)(A) "allow[s] a separated affiliate or a BOC to advertise a BOC call-in number to which potential customers might choose to initiate a call."<sup>337</sup> BellSouth argues that section 274(c)(2)(A) of the Act is clear on its face, and therefore "no further elucidation" of that section is necessary.<sup>338</sup>

148. PacTel argues that section 274(c)(2)(A)'s requirement that inbound telemarketing or referral services "be made available to all electronic publishers on request, on nondiscriminatory terms" means that the terms of the service must be generally available to all *similarly situated* electronic publishers.<sup>339</sup> U S WEST argues that the requirement should be construed to apply only to services that are of "like kind."<sup>340</sup> PacTel contends that section 274(c)(2)(A), like section 202(a) of the Act, allows reasonable discrimination.<sup>341</sup> Conversely, Time Warner argues that nothing in the Act indicates that Congress intended to limit the provision of inbound telemarketing or referral services required by section 274(c)(2)(A) to competing electronic publishers offering services "comparable" to those offered by a BOC separated affiliate.<sup>342</sup>

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by the separated affiliate for use by customers or potential customers of the separated affiliate; (3) respond to incoming calls using the separated affiliate's name and, if possible, a script approved in advance by the separated affiliate; (4) answer customer questions, provide information and take orders for products or services using data procedures provided or approved by the separated affiliate; and (5) process orders for fulfillment by the separated affiliate and forward such orders to the separated affiliate. *Id.*

<sup>336</sup> SBC at 13-14.

<sup>337</sup> *Id.*

<sup>338</sup> BellSouth at 18.

<sup>339</sup> PacTel at 15.

<sup>340</sup> U S WEST at 11. U S WEST argues, for example, that, if a section 274 affiliate offered an electronic travel bureau service to which U S WEST made referrals on an in-bound calling basis, section 274(c)(2)(A) could be interpreted to require U S WEST to refer callers to all other electronic publishers, upon request, regardless of whether the services provided by such electronic publishers were comparable to those of U S WEST's section 274 affiliate. *Id.* at 14.

<sup>341</sup> PacTel at 15.

<sup>342</sup> Time Warner Reply at 8.

### 3) Discussion

149. We conclude that a BOC may, pursuant to section 274(c)(2)(A), both provide "referral services" and "market" property, goods, or services related to the provision of electronic publishing by telephone to a customer or potential customer who initiated the call. This is consistent with the plain language of the statute, including the definition of "inbound telemarketing" in section 274(i)(7), and with the legislative history interpreting section 274(c)(2)(A). We also conclude, however, consistent with the clear language of the statute and with the House Report, that, to the extent a BOC provides inbound telemarketing or referral services for a separated affiliate, electronic publishing joint venture, or affiliate, it must make available "such services . . . to all electronic publishers on request, on nondiscriminatory terms."<sup>343</sup> Consistent with the legislative history, this means that the BOC must offer "the same service on the same terms and conditions, and prices to non-affiliates as to its affiliates."<sup>344</sup>

150. A BOC may choose to provide inbound telemarketing or referral services either pursuant to a contractual arrangement or during the normal course of its inbound telemarketing operations. To the extent a BOC chooses either or both of these approaches in providing inbound telemarketing or referral services to a separated affiliate, electronic publishing joint venture or affiliate, we conclude, based on the nondiscrimination proviso in section 274(c)(2)(A), that it must make available the same approach to unaffiliated electronic publishers.

151. With regard to inbound telemarketing or referral services provided by a BOC to its separated affiliate, electronic publishing joint venture, or affiliate pursuant to a contractual arrangement, we find that the BOC must make available the same terms, conditions, and prices for such services to unaffiliated electronic publishers, except to the extent legitimate price differentials may exist. For example, such price differentials may reflect differences in cost, or may reflect the fact that an unaffiliated electronic publisher has requested superior or less favorable treatment in exchange for paying a higher or lower price to the BOC. As we stated in the *First Interconnection Order*, where costs differ, rate differences that accurately reflect those differences are not unlawfully discriminatory.<sup>345</sup> We similarly conclude that price differences, "when based upon legitimate variations in costs, are

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<sup>343</sup> 47 U.S.C. § 274(c)(2)(A).

<sup>344</sup> House Report at 86.

<sup>345</sup> *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, *First Report and Order* ¶ 860, 11 FCC Rcd 15499, 15928 (1996) (*First Interconnection Order*), *Order on Reconsideration*, 11 FCC Rcd 13042 (1996) (*First Reconsideration*), further recon. pending, pet. for review sub nom. and partial stay granted, *Iowa Utilities Board v. FCC*, No. 96-3221 and consolidated cases (8th Cir. filed Sept. 6, 1996), partial stay lifted in part, *Iowa Utilities Board v. FCC*, No. 96-3321 and consolidated cases, 1996 WL 589284 (8th Cir. Oct. 15, 1996).

permissible under the 1996 Act when justified."<sup>346</sup> PacTel's argument that the "nondiscriminatory" requirement in section 274(c)(2)(A) means that the terms of the service must be generally available to all "similarly situated" electronic publishers, therefore, has merit to the extent that price differences among electronic publishers reflect legitimate differences in cost.

152. The statute requires that, to the extent a BOC markets property, goods or services related to the provision of electronic publishing to a customer, or refers a customer to a separated affiliate, electronic publishing joint venture or affiliate during the normal course of its telemarketing operations, it must provide such marketing or referral services to all unaffiliated electronic publishers requesting such services, on nondiscriminatory terms. Thus, to the extent that a BOC provides referral service if a customer has not initially independently requested a specific referral to the BOC affiliate, a BOC must provide the names of all such unaffiliated electronic publishers, as well as its own affiliated electronic publishers, in random order, to the customer. A similar standard may also be appropriate for particular inbound telemarketing activities. We find that our interpretation is consistent with the intent of section 274(c)(2)(A) to ensure that a BOC providing inbound telemarketing or referral services to a separated affiliate provides such services on a nondiscriminatory basis to all unaffiliated electronic publishers.

153. We reject U S WEST's argument that imposing such a requirement on the BOCs with respect to referral services would be overly burdensome.<sup>347</sup> We note, for example, that BOCs currently are subject to similar requirements in cases where a new local exchange customer of the BOC requests information regarding interexchange service. In such cases, BOCs are required, *inter alia*, to provide customers with the names and, if requested, the telephone numbers of carriers offering interexchange services.<sup>348</sup> As part of this requirement, a BOC must ensure that the names of the interexchange carriers are provided in random order.<sup>349</sup>

154. We disagree with U S WEST's contention that a BOC's obligation to provide inbound telemarketing or referral services under section 274(c)(2)(A) applies only with respect to services that are "comparable" to those of its separated affiliate. We conclude that a BOC's obligation under section 274(c)(2)(A) to make available inbound telemarketing and referral services on a nondiscriminatory basis requires that a BOC make available to unaffiliated electronic publishers the same services it provides to an affiliated electronic

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<sup>346</sup> *Id.*

<sup>347</sup> See U S WEST at 14.

<sup>348</sup> See *Investigation of Access and Divestiture Related Tariffs*, CC Docket No. 83-1145, 101 F.C.C.2d 935, 950 (rel. Aug. 20, 1985).

<sup>349</sup> *Id.* at 950.

publisher, regardless of whether the unaffiliated electronic publishers offer services that are "comparable" to those of the BOC. Nothing in the statute or its legislative history indicates that a BOC must make available inbound telemarketing and referral services only to electronic publishing entities providing services "comparable" to those of the BOC's affiliate. To the extent that a BOC's agreement with its affiliated electronic publisher is limited to certain types of marketing or referral services, however, the BOC is then only obligated to make the same types of marketing or referral services available to unaffiliated electronic publishers.

155. With respect to AT&T's concern that interpreting section 274(c)(2)(A) to allow BOCs to "market" the electronic publishing services of their separated affiliates would circumvent the joint marketing prohibitions in section 274(c)(1), we find that the unambiguous statutory definition of "inbound telemarketing" in section 274(i)(7), and the fact that the general prohibition in section 274(c)(1) applies "except as provided in paragraph (2) [274(c)(2)]," requires this interpretation. We note that the statutory language allows BOCs to provide such marketing services only on nondiscriminatory terms, as discussed above. In addition, while our interpretation of the nondiscrimination requirement may serve as a disincentive for certain BOCs to market the services of an affiliated electronic publisher on an inbound call, we find that the statutory language compels this interpretation.

156. Finally, we conclude that section 274(c)(2)(A) prohibits outbound telemarketing or similar activities in which a call is initiated by a BOC, its affiliate, or someone on its behalf. Because section 274(c)(2)(A), by its terms, applies only to "inbound telemarketing" or referral services related to the provision of electronic publishing, we believe that Congress did not intend to permit BOCs to engage in outbound telemarketing activities in adopting section 274(c)(2)(A). To the extent that the statutory language leaves any ambiguity on this question, the House Report supports our interpretation that a BOC is prohibited under section 274(c)(2)(A) from engaging in outbound telemarketing.<sup>350</sup> We also believe that allowing a BOC to engage in outbound telemarketing activities to promote the electronic publishing services of its separated affiliate would eviscerate the general prohibition on BOC joint marketing activities in section 274(c)(1)(A) of the Act.

**b. Teaming Arrangements -- Section 274(c)(2)(B)**

**1) Background**

157. In the *Notice*, we observed that, in addition to certain joint telemarketing activities, a BOC is permitted to engage in "teaming" or "business arrangements" to provide electronic publishing services under certain conditions pursuant to section 274(c)(2)(B).<sup>351</sup>

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<sup>350</sup> See House Report at 86.

<sup>351</sup> *Notice* at ¶ 56.



Section 274(c)(2)(B) specifically states that a "[BOC] may engage in nondiscriminatory teaming or business arrangements to engage in electronic publishing with any separated affiliate or with any other electronic publisher if (i) the [BOC] only provides facilities, services, and basic telephone service information<sup>352</sup> as authorized by this section, and (ii) the [BOC] does not own such teaming or business arrangement."<sup>353</sup>

158. We sought comment in the *Notice* on what types of arrangements are encompassed by the terms "teaming" or "business arrangements,"<sup>354</sup> and on the significance of section 274(c)(2)(B)'s placement under the "Joint Marketing" provisions in section 274(c).<sup>355</sup> We also sought comment on what regulations, if any, are necessary to ensure that the arrangements in which BOCs engage pursuant to section 274(c)(2)(B) are "nondiscriminatory," and on how the provision of "basic telephone service information" under that section relates to the requirements in section 222 for access to and use of CPNI.<sup>356</sup>

## 2) Comments

159. Ameritech, NAA, NYNEX, and PacTel generally argue that the terms "teaming" or "business arrangements" in section 274(c)(2)(B) contemplate a broad range of permissible activities.<sup>357</sup> Ameritech argues that, so long as all the conditions under section 274(c)(2)(B) are met and the requirements of section 274 are otherwise satisfied, a BOC should be free to enter into a teaming or business arrangement with a separated affiliate or electronic publishing joint venture to jointly market electronic publishing services.<sup>358</sup> NYNEX

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<sup>352</sup> "Basic telephone service information" is defined in section 274 as "network and customer information of a [BOC] and other information acquired by a [BOC] as a result of its engaging in the provision of basic telephone service." 47 U.S.C. § 274(i)(3).

<sup>353</sup> 47 U.S.C. § 274(c)(2)(B).

<sup>354</sup> *Notice* at ¶ 56.

<sup>355</sup> *Id.* at ¶ 57.

<sup>356</sup> *Id.*

<sup>357</sup> Ameritech at 22; NAA at 8; NYNEX at 22; PacTel at 16-17. NYNEX specifically argues that, under section 274(c)(2)(B), a BOC and its separated affiliate are permitted to engage in the following teaming activities: (1) provide to a customer, and contract separately with that customer for, regulated telephone service and electronic publishing services, respectively; (2) make joint sales calls through premises visits or telemarketing, and plan for such sales calls; (3) supply potential customers with copies of sales literature describing each entity's products and services which are the subject of the teaming arrangement; (4) advertise and promote the availability of the products and services offered through the teaming arrangement, so long as the advertising makes clear that the products are separately provided; and (5) coordinate the installation of services. NYNEX at 22-23.

<sup>358</sup> Ameritech at 22; *see also* NAA at 8; PacTel at 16-17.

contends that teaming arrangements provide another form of "one-stop shopping" for consumers and present minimal risk of anticompetitive behavior.<sup>359</sup> PacTel argues that the language of section 274(c)(2)(B) is so broad that it includes any activity other than the provision of electronic publishing itself, including promotion, marketing, sales and advertising activities.<sup>360</sup> SBC argues that section 274(c)(2)(B) should be interpreted to permit a BOC and its separated affiliate jointly to promote, market, sell, and advertise their respective services pursuant to *any* form of business arrangement.<sup>361</sup>

160. Bell Atlantic argues that the term "teaming or business arrangements" as used in section 274(c)(2)(B) encompasses myriad arrangements which include, but are not limited to, marketing proposals in which a BOC and an electronic publisher each prepares its portion of a joint bid to a customer.<sup>362</sup> BellSouth contends that a teaming or business arrangement is more substantial than a coordinated joint marketing or sales campaign or joint bid preparation arrangement, given the statute's reference to BOC ownership in section 274(c)(2)(B).<sup>363</sup> YPPA argues that teaming arrangements, which it asserts were permissible under the MFJ, are any arrangements whereby "two businesses act independently to provide related products or services, but coordinate their activities so that the customer obtains a 'complete' package of the desired products or services."<sup>364</sup> According to YPPA, "teaming" may include joint sales activities (including joint planning for sales calls), through advertising, premise visits or telemarketing.<sup>365</sup>

161. Conversely, Time Warner argues that section 274(c)(2)(B) permits a BOC to engage in a non-BOC owned teaming or business arrangement to provide its electronic publishing affiliate with the necessary facilities and telephone service for electronic

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<sup>359</sup> NYNEX at 23.

<sup>360</sup> PacTel at 17.

<sup>361</sup> SBC at 15.

<sup>362</sup> Bell Atlantic at 10.

<sup>363</sup> BellSouth at 19.

<sup>364</sup> YPPA at 8. The term "teaming arrangement," however, does not appear in the MFJ and was never specifically defined by the district court that administered the MFJ.

<sup>365</sup> *Id.* YPPA argues, for example, that a BOC could team with its separated affiliate, "with the BOC providing a customer with regulated telephone service and the separated affiliate providing the same customer with electronic publishing services, and perhaps interLATA service as well." *Id.* In addition, YPPA contends that a BOC and a separated affiliate may coordinate advertising activities so that the BOC's and the separated affiliate's separate advertisements appear on the same page of the newspaper. *Id.* at 8-9.

publishing, provided that such facilities and services are offered on a nondiscriminatory basis pursuant to tariffed rates and conditions.<sup>366</sup>

162. Bell Atlantic argues that, by placing section 274(c)(2)(B) under the "Joint Marketing" provisions in section 274(c), Congress intended to clarify that "teaming or business arrangements" are not to be considered joint marketing activities.<sup>367</sup> PacTel argues that "teaming arrangements" are included under the heading of "Joint Marketing" because such arrangements are one of the three categories of exceptions listed under that heading.<sup>368</sup>

163. PacTel argues that the nondiscrimination requirement for teaming and other business arrangements relates to how a BOC provides facilities, services and basic telephone service information to electronic publishers, not to a BOC's choice of teaming partners.<sup>369</sup> Even if the nondiscrimination requirement were interpreted to apply to a BOC's choice of teaming partners, PacTel argues, a BOC nevertheless would retain discretion to team only with electronic publishers that met its reasonable standards.<sup>370</sup> BellSouth similarly contends that the nondiscrimination obligation of section 274(c)(2)(B) precludes a BOC from giving preference to the teaming or business arrangement in the conduct of its regulated common carrier activities, but does not impose on the BOC an obligation to invest in a particular entity.<sup>371</sup> SBC argues that the nondiscrimination requirement in section 274(c)(2)(B) "provide[s] evenhandedness in the BOCs' provision of marketing and other services to [unaffiliated] electronic publishers."<sup>372</sup> YPPA argues that the nondiscrimination requirement means that a teaming arrangement between a BOC and its separated affiliate "cannot be markedly different" from teaming arrangements made available to other electronic publishers.<sup>373</sup>

164. NAA argues that, if a BOC uses its CPNI to provide "basic telephone service information" as part of a teaming arrangement, it is subject to the privacy requirements in

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<sup>366</sup> Time Warner at 24.

<sup>367</sup> Bell Atlantic at 10.

<sup>368</sup> PacTel at 17.

<sup>369</sup> *Id.* at 18.

<sup>370</sup> *Id.*

<sup>371</sup> BellSouth at 19.

<sup>372</sup> SBC at 15-16.

<sup>373</sup> YPPA at 9.

section 222 for access to and use of the CPNI.<sup>374</sup> PacTel states that section 274(c)(2)(B) allows a BOC to use CPNI as part of a teaming arrangement, consistent with section 222 of the Act.<sup>375</sup> PacTel therefore argues that "BOCs can use CPNI with the type of telecommunications service from which the information was derived, and with customer authorization can use it with any service."<sup>376</sup> PacTel maintains that, to the extent that "basic telephone service information" is also CPNI, section 222 of the Act and any implementing regulations the Commission adopts govern the use of such information.<sup>377</sup> To the extent such information is not CPNI, but network information, PacTel argues that a BOC is required to share such information with all electronic publishers with which the BOC teams.<sup>378</sup> SBC argues that, where information qualifies as both "basic telephone service information" under section 274(i)(3) as well as CPNI under section 222(f)(1), the terms of section 274 should prevail over the general terms in section 222 of the Act.<sup>379</sup> SBC points out that section 274 of the Act contains no "approval" requirement as a precondition for using, disclosing, or accessing basic telephone service information.<sup>380</sup> As such, SBC argues, a BOC should be permitted to use such information without first obtaining approval under section 222(c)(1) when engaged in permissible teaming or business arrangements.<sup>381</sup>

### 3) Discussion

165. We decline at this time to adopt specific regulations clarifying the types of arrangements that are contemplated by the terms "teaming or business arrangements" in section 274(c)(2)(B) of the Act. We conclude that those terms, which are not defined in the statute, may encompass a broad range of permissible marketing activities because section 274(c)(2)(B) imposes no explicit marketing limitations. At the same time, however, this provision contains no language that operates to remove business or teaming arrangements from the scope of the prohibitions in section 274(c)(1).<sup>382</sup> We thus find that Congress, in

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<sup>374</sup> NAA at 8.

<sup>375</sup> PacTel at 18-19.

<sup>376</sup> *Id.* at 19.

<sup>377</sup> *Id.*

<sup>378</sup> *Id.*

<sup>379</sup> SBC at 16-17.

<sup>380</sup> *Id.* at 17.

<sup>381</sup> *Id.*

<sup>382</sup> See discussion of the prohibitions in section 274(c)(1), *supra* at ¶¶ 116-139, and discussion of electronic publishing joint ventures, *infra* at ¶¶ 186-188.

including the general terms "teaming or business arrangements" in section 274(c)(2)(B), did not intend to limit or expand the types of marketing activities in which BOCs could engage under that section other than those specifically restricted or authorized elsewhere in section 274 (*e.g.*, in section 274(c)(1)).

166. Under section 274(c)(2)(B), therefore, a BOC providing telecommunications services and the electronic publishing provider with which it teams are limited to marketing their respective services. This interpretation is supported by the plain language of section 274(c)(2)(B), which generally provides that a BOC may engage in teaming or business arrangements if such BOC "only provides facilities, services, and basic telephone service information as authorized by [section 274]." Under this interpretation, a BOC is permitted to market only the facilities, services and basic telephone service information that section 274(c)(2)(B) permits the BOC to provide. This interpretation also is supported by a comparison of the text in section 274(c)(2)(B) with the text of sections 274(c)(2)(A) and (C), relating to inbound telemarketing and electronic publishing joint ventures, respectively. Unlike section 274(c)(2)(C), section 274(c)(2)(B) does not specifically permit the authorized entity to engage in joint marketing activities otherwise prohibited to the BOC by section 274(c)(1), *i.e.*, promotion, marketing, sales, and advertising activities. In addition, unlike section 274(c)(2)(A), section 274(c)(2)(B) contains no language that explicitly addresses marketing. We therefore conclude that a BOC participating in a teaming arrangement may not market the electronic publishing services of an electronic publishing provider with which it teams. In addition, the restrictions specifically set forth in section 274(c)(2)(B) would apply, *i.e.*, that such BOC only provide facilities, services and basic telephone service information as authorized by section 274, that the BOC not "own" the teaming or business arrangement, and that the teaming arrangement be "nondiscriminatory."

167. As noted above, a few commenters provide examples of the types of activities they believe are permissible under section 274(c)(2)(B) as a "teaming or business arrangement." Bell Atlantic, for example, contends that such arrangements include, but are not limited to, marketing proposals in which a BOC and an electronic publisher each prepares its portion of a joint bid to a customer.<sup>383</sup> In addition, YPPA argues that a teaming arrangement is any arrangement whereby "two businesses act independently to provide related products or services, but coordinate their activities so that the customer obtains a 'complete' package of the desired products or services."<sup>384</sup> YPPA states, for example, that a BOC may engage in a teaming arrangement with a separated affiliate whereby the BOC provides a customer with regulated telephone service and the separated affiliate provides the same customer with electronic publishing services.<sup>385</sup> We conclude that nothing in the statute prohibits a BOC from engaging in the types of activities proposed by these commenters, so

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<sup>383</sup> Bell Atlantic at 10.

<sup>384</sup> YPPA at 8.

<sup>385</sup> *Id.*

long as all of the requirements of section 274, including section 274(c)(2)(B), are satisfied. To the extent issues arise in the future as to whether certain other activities are permissible under section 274(c)(2)(B) as "teaming or business arrangements," we intend to address those issues on a case-by-case basis.

168. We also conclude that section 274(c)(2)(B)'s requirement that a BOC only engage in teaming or business arrangements that are "nondiscriminatory" means that a BOC may provide to the teaming arrangement the necessary facilities, services and basic telephone service information for electronic publishing, provided that such facilities, services and information are offered on a nondiscriminatory basis both to other teaming arrangements and to unaffiliated electronic publishers. Under this interpretation, for example, a BOC would be prohibited from favoring a teaming arrangement with a separated affiliate over an arrangement with an unaffiliated electronic publishing provider in the provision of the BOC's facilities, services and basic telephone service information under section 274(c)(2)(B). We agree with PacTel and BellSouth that section 274(c)(2)(B) of the Act does not require a BOC to participate in a teaming arrangement with, or to invest in, an electronic publishing provider. Given that a "teaming arrangement" under section 274(c)(2)(B) contemplates that a BOC may hold less than a 10 percent interest in such arrangement,<sup>386</sup> we believe that Congress did not intend to compel a BOC to acquire such an interest in other arrangements simply because the BOC has chosen to participate in a teaming arrangement with an electronic publisher of its choice. In addition, we find that such an interpretation would provide a disincentive for BOCs to engage in teaming arrangements in contravention of the plain language of section 274(c)(2)(B) and the pro-competitive goals of the 1996 Act.

169. We defer to our pending CPNI proceeding the question of whether the term "basic telephone service information" as defined in section 274(i)(3) of the Act includes CPNI as defined in section 222 of the Act. Based on the definition of "basic telephone service information" in section 274(i)(3), however, we conclude that the term includes network information of the BOC.<sup>387</sup> We also defer to our CPNI proceeding the issue of whether section 222 requires a BOC engaged in permissible marketing activities under section 274(c)(2) to obtain customer approval before using, disclosing, or permitting access to CPNI. In particular, we defer to that proceeding the issue of whether or to what extent section 274(c)(2)(B) of the Act imposes any obligations on BOCs that use, disclose, or permit access to CPNI pursuant to a teaming arrangement. As noted above, however, the CPNI requirements the Commission previously established in the *Computer II* and *Computer III* proceedings remain in effect, pending the outcome of the CPNI proceeding, to the extent that they do not conflict with section 222 of the Act. Because we conclude that "basic telephone

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<sup>386</sup> We note that under section 274(c)(2)(B) a BOC may not "own" a teaming arrangement, *i.e.*, have a direct or indirect equity interest (or the equivalent thereof) of more than 10 percent of an entity, or the right to more than 10 percent of the gross revenues of an entity under a revenue sharing or royalty agreement. See 47 U.S.C. § 274(i)(8).

<sup>387</sup> See 47 U.S.C. § 274(i)(3).

service information" under section 274(i)(3) includes network information, BOCs that provide network information as part of a teaming arrangement are required to provide such information to other teaming arrangements on a nondiscriminatory basis pursuant to section 274(c)(2)(B).

**c. Electronic Publishing Joint Ventures -- Section 274(c)(2)(C)**

**1) Permissible Level of BOC Ownership Interest in Electronic Publishing Joint Venture and Waiver for "Good Cause"**

**a) Background**

170. Section 274(c)(2)(C) of the Act expressly permits a BOC or affiliate to participate on a nonexclusive basis in electronic publishing joint ventures with entities that are not a [BOC], affiliate, or separated affiliate to provide electronic publishing services.<sup>388</sup> The BOC or affiliate, however, may not hold more than a 50 percent direct or indirect equity interest (or the equivalent thereof) or the right to more than 50 percent of the voting control over the joint venture.<sup>389</sup> In addition, officers and employees of a BOC or affiliate participating in an electronic publishing joint venture may hold no greater than 50 percent of the voting control over the joint venture.<sup>390</sup> The House Report clarifies that this restriction prohibits officers and employees of a BOC from "*collectively* having more than 50 percent of the voting control of the venture."<sup>391</sup> In the *Notice*, we tentatively concluded that a BOC is deemed to "own" an electronic publishing joint venture "if it holds greater than a 10 percent but not more than a 50 percent direct or indirect equity interest in the venture, or has the right to greater than 10 percent but not more than 50 percent of the venture's gross revenues."<sup>392</sup> We sought comment on that tentative conclusion.<sup>393</sup>

171. Section 274(c)(2)(C) also provides that, "[i]n the case of joint ventures with small, local electronic publishers, the Commission for good cause shown may authorize [a BOC] or affiliate to have a larger equity interest, revenue share, or voting control but not to

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<sup>388</sup> 47 U.S.C. § 274(c)(2)(C).

<sup>389</sup> *Id.*

<sup>390</sup> *Id.*

<sup>391</sup> House Report at 86 (emphasis added). As noted above, the Conference Committee adopted the House provisions, with some modifications. Joint Explanatory Statement at 156.

<sup>392</sup> *Notice* at ¶ 59.

<sup>393</sup> *Id.*

exceed 80 percent."<sup>394</sup> As we observed in the *Notice*, although the term "small, local electronic publisher" is not defined in the statute, the House Report indicates that the term was intended to apply to publishers serving communities of fewer than 50,000 persons.<sup>395</sup> We sought comment in the *Notice* on how we should determine the service area of a "small, local electronic publisher" for the purpose of applying the 80 percent threshold.<sup>396</sup> In addition, we sought comment on whether it would be consistent with congressional intent to adopt additional standards for determining which electronic publishers are subject to the 80 percent threshold, and, if so, what such standards should be.<sup>397</sup> We also sought comment on how we should define "local" under section 274(c)(2)(C).<sup>398</sup>

172. With regard to section 274(c)(2)(C)'s provision allowing waiver of the 50 percent equity interest and revenue share limitation in the case of joint ventures with small, local electronic publishers for "good cause shown," we sought comment on the "good cause" showing that is required under that provision, and whether any additional regulations are necessary to implement the provision.<sup>399</sup>

#### b) Comments

173. The Joint Parties agree that a minimum 10 percent equity interest or gross revenue share by a BOC is sufficient to constitute ownership of an electronic publishing joint venture.<sup>400</sup> NAA states that a BOC must "own" an electronic publishing joint venture, which means it must hold greater than a 10 percent direct or indirect equity interest in the venture, or have the right to greater than 10 percent of the venture's gross revenues.<sup>401</sup> NAA also points out that, except for joint ventures with small, local electronic publishers, a BOC is limited to a minority stake in the electronic publishing joint venture.<sup>402</sup> NAA argues that we should not adopt any standards at this time for determining what constitutes a "small, local electronic publisher" under section 274(c)(2)(C), but instead should address the issue in the

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<sup>394</sup> 47 U.S.C. § 274(c)(2)(C).

<sup>395</sup> *Notice* at ¶ 60.

<sup>396</sup> *Id.* at ¶ 61.

<sup>397</sup> *Id.*

<sup>398</sup> *Id.*

<sup>399</sup> *Id.* at ¶ 62.

<sup>400</sup> Joint Parties at 3.

<sup>401</sup> NAA at 8.

<sup>402</sup> *Id.*



context of specific waiver applications.<sup>403</sup> NAA maintains that, in such cases, the "good cause" showing that is required under section 274(c)(2)(C) would be satisfied by demonstrating that greater participation by the BOC "is needed to enable the [electronic publishing] service to be provided to the public."<sup>404</sup>

c) Discussion

174. We conclude that a BOC may hold greater than a 10 percent but not more than a 50 percent direct or indirect equity interest in an electronic publishing joint venture under section 274(c)(2)(C) of the Act, or may have the right to greater than 10 percent but not more than 50 percent of the venture's gross revenues. Therefore, while a BOC may "own" an electronic publishing joint venture, it is limited to a 50 percent stake in such venture. Our interpretation is consistent with the definition of "electronic publishing joint venture" in section 274(i)(5) of the Act, which contemplates a degree of ownership by a BOC or affiliate,<sup>405</sup> the definition of "own" in section 274(i)(8), and with the plain language of section 274(c)(2)(C), which restricts a BOC's ownership or revenue share interest in an electronic publishing joint venture to 50 percent.

175. We decline at this time to adopt any standards for determining which entities constitute "small, local electronic publishers" for the purpose of applying the 80 percent threshold in section 274(c)(2)(C) of the Act. While the House Report indicates that the term was intended to apply to publishers serving communities of fewer than 50,000 persons, it is difficult from a practical standpoint to define the service area of such publishers, given that electronic publishing services, by definition, contemplate the dissemination of information to the general public. Moreover, the term "small" may be defined based on a variety of standards, including the size of the community served, the gross revenues of the electronic publishing entity, or other factors. Given the difficulties with establishing standards at this time for determining what constitutes a "small, local electronic publisher" under section 274(c)(2)(C), we conclude that it is best to clarify this phrase on a case-by-case basis.

176. With regard to the "good cause" showing that is required for a BOC to hold a greater interest in an electronic publishing joint venture with a small, local electronic publisher under section 274(c)(2)(C) of the Act, one factor we may consider in determining whether a BOC has satisfied this standard is whether increased investment by the BOC is necessary to enable the joint venture to provide electronic publishing services. In adopting section 274(c)(2)(C), we believe that Congress intended, *inter alia*, to encourage market participation by small, local electronic publishing entities in the provision of electronic publishing services by allowing a BOC to hold a greater ownership interest in electronic

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<sup>403</sup> *Id.* at 9.

<sup>404</sup> *Id.*

<sup>405</sup> See 47 U.S.C. § 274(i)(5).